STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 1999
v	No. 208411 Oakland Circuit Court
DONALD ALFRED BOSCO, Defendant-Appellant.	LC No. 97-152982 FH

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). He was sentenced to three years' probation with the first year to be served in the Oakland County Jail. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that the trial court abused its discretion in admitting other acts evidence pursuant to MRE 404(b). Defendant claims that evidence of other alleged incidents of sexual contact was character evidence, offered for the improper purpose of proving defendant had the propensity to commit the crime on the date charged. We disagree.

MRE 404(b) governs admission of evidence of bad acts. It provides, in pertinent part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich

490, 495; 577 NW2d 673 (1998); *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra* at 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 338 (1993), amended by 445 Mich 1205; 520 NW2d 338. The list of purposes for admission of other acts evidence within MCR 404(b) is illustrative, not exhaustive. *People v Wright*, 161 Mich App 682, 688 n 4; 411 NW2d 826 (1987).

In the present case, complainant testified at length regarding incidents of sexual contact that occurred before and after the charged incident that took place on October 23, 1991. Recorded telephone conversations between complainant and defendant also contained several references to other sexual encounters. To the extent that challenged testimony involved incidents of sexual contact that occurred after October 23, 1991, we conclude that this evidence of defendant's other acts was not admitted as evidence of defendant's character. Instead, such evidence was directly relevant to whether the incident of sexual contact occurred on October 23, 1991, as alleged by complainant. Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *VanderVliet, supra* at 64; *People v Hall*, 433 Mich 573, 580, 583-584 (Boyle, J), 588-589 (Brickley, J); 447 NW2d 580 (1989).

We further conclude that the remainder of the evidence of defendant's other acts was admitted for the proper purpose of establishing that defendant employed a scheme or plan to engage in sexual acts with complainant after taking him to various events. Such evidence was relevant to whether complainant's account of the events on October 23, 1991, was credible. See *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973); *Wright, supra* at 687. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr, supra* at 497; *Rodriquez v Solar of Michigan*, 191 Mich App 483, 487; 478 NW2d 914 (1991). Moreover, we agree with the trial court that the probative value of the other act evidence was not substantially outweighed by the danger of unfair prejudice, because the other act evidence tended to show a familiarity between defendant and complainant that was particularly relevant to the disposition of this charge of sexual misconduct. See MRE 403; *DerMartzex, supra* at 413; *Wright, supra* at 687.

Next, defendant argues that the trial court erred in denying his motion for a directed verdict. Specifically, defendant claims that the offense charged violated ex post facto prohibitions because the conduct with which he was charged was not prohibited by the sexual misconduct statute at the time he was alleged to have committed it. We disagree.

Defendant was originally charged with engaging in sexual contact with a person thirteen to sixteen years of age in violation of MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), as amended by 1994 PA 213.[1] The version of the statute in effect on October 23, 1991, did not specifically preclude such conduct.[2] At the time defendant made his motion for a directed verdict, the trial court permitted the prosecution to amend the information to charge defendant with engaging in sexual contact with complainant through the use of force or coercion rather than under the new provisions regarding age that was not enacted until after the alleged incident date. Initially, the question presented by this issue is whether the trial court properly allowed the prosecution to amend the information.

A trial court's ruling on a motion to amend an information will not be reversed on appeal unless defendant was prejudiced in the presentation of his defense. *People v Hardiman*, 132 Mich App 382, 386; 347 NW2d 460 (1984). MCR 6.112(G) provides:

> The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information. [See also MCL 767.76; MSA 28.1016.]

An amendment to the information causes unacceptable prejudice to a defendant's right to a fair opportunity to meet the charges against him if it results in "unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); see *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998); *People v Adams*, 202 Mich App 385, 388; 509 NW2d 530 (1993).

Here, defendant was, at all times, apprised of the fact that he was charged with engaging in one count of sexual contact with complainant. Thus, amendment to the information changing only the method defendant was alleged to have engaged in the conduct did not pose unfair surprise. The information was amended prior to the presentation of defendant's case and defendant was able to examine complainant at length regarding the degree of force or coercion involved in the alleged incident. Therefore, defendant received adequate notice of the charge against him and a sufficient opportunity to defend himself. See *Hunt*, *supra* at 364; *Adams*, *supra* at 389. Accordingly, we find no error in permitting the amendment of the information.

Regarding defendant's ex post facto claim, we find that the amendment to the information cured any potential ex post facto errors. The passage or enactment of ex post facto laws is prohibited by the United States and Michigan Constitutions. US Const art 1, § 10; Const 1963, art 1, § 10. An ex post facto law is one that "'makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action' or 'that *aggravates a crime*, or makes it *greater* than it was, when it was committed.'" *People v Doyle*, 451 Mich 93, 100; 545 NW2d 627 (1996) (emphasis in original). Both the former and the current version of MCL 750.520e(1); MSA 28.788(5)(1) prohibit engaging in sexual contact with another through the use of force or coercion. Thus, by allowing the information to be amended, the trial court did not increase the punishment under MCL 750.520e(1); MSA 28.788(5)(1) or retroactively apply an unduly enlarged version of the statute.

Lastly, defendant argues that the trial court erred in finding that defendant used coercion to accomplish his sexual contact with complainant. We disagree. When reviewing any findings of fact by a trial court, this Court may only set aside those findings that are clearly erroneous. MCR 2.613(C); *People v Miller*, 199 Mich App 609, 612-613; 503 NW2d 89 (1993). When reviewing the sufficiency of the evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). "[F]orce or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *People v Reid*, 233 Mich App 457, 468-470; 592 NW2d 767 (1999). Coercion does not always require physical force:

> [Coercion] may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. [*People v Premo*, 213 Mich App 406; 540 NW2d 715 (1995) (quoting Black's Law Dictionary (5th ed), 234); see also *Reid, supra*.]

Considering all of the circumstances, we conclude that substantial evidence indicated that defendant coerced complainant into submitting to the sex act on the night in question. Defendant was in a position of authority over complainant as complainant's employer. Moreover, complainant testified that he considered defendant a father figure and a role model. Complainant's mother testified that she trusted defendant and thought of defendant as a "surrogate father" to complainant because complainant did not have adequate adult, male role models.

The prosecution also offered evidence that defendant used his position of authority to subjugate complainant, effectively coercing him to submit to defendant's sexual advances on October 23, 1991. During the recorded telephone conversation on March 5, 1997, defendant admitted that his practice of taking complainant to hockey games was coercive and manipulative. Moreover, complainant's testimony and the transcripts of the telephone conversations indicate that, on many occasions, defendant engaged in sexual contact with complainant in his store during complainant's scheduled work hours. Complainant testified that he felt terrorized and believed that he could not escape the relationship without disclosing embarrassing details. On occasions that complainant told defendant he did not wish to engage in sex, defendant "overpowered [him] mentally." Furthermore, defendant's reference to the Pope during his first sexual encounter with complainant indicates that, to some extent, defendant used religion to manipulate complainant. Considering that evidence in a light most favorable to the prosecution, a reasonable factfinder could find, beyond a reasonable doubt, that defendant coerced complainant to submit to his sexual advances against complainant's will. See *Reid, supra* at 6-7; *People v Regts*, 219 Mich App 294, 296; 555 NW2d 896 (1996).

Thus, the trial court did not clearly err in finding that defendant used coercion to effectuate his sexual contact with complainant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Robert J. Danhof

[1] MCL 750.520e(1); MSA 28.788(5)(1), as amended by 1994 PA 213, provides, in pertinent part:

> A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exists:
>
> (a) That other person is at least 13 years of age and under 16 years of age, and the actor is 5 or more years older than that other person.
>
> (b) Force or coercion is used to accomplish the sexual contact.

[2] MCL 750.520e(1); MSA 28.788(5)(1) provided:

> A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exists:
>
> (a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (iv).
>
> (b) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> (c) That other person is under the jurisdiction of the department of corrections, and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who has knowledge that the other person is under the jurisdiction of the department of corrections.